

STATE OF VERMONT
PUBLIC SERVICE BOARD

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| Petition of Vermont Gas Systems, Inc., for a |) | |
| certificate of public good, pursuant to 30 V.S.A. |) | |
| § 248, authorizing the construction of the |) | |
| “Addison Natural Gas Project” consisting of |) | |
| approximately 43 miles of new natural gas |) | |
| transmission pipeline in Chittenden and |) | Docket No. 7970 |
| Addison Counties, approximately 5 miles of |) | |
| new distribution mainlines in Addison County, |) | |
| together with three new gate stations in |) | |
| Williston, New Haven, and Middlebury, |) | |
| Vermont |) | |

REPLY BRIEF OF VERMONT GAS SYSTEMS RE
MEMORANDUM OF UNDERSTANDING

This Reply is filed on behalf of Vermont Gas Systems, Inc. (“Vermont Gas” or “VGS”) in response to the Briefs of AARP, Ms. Lyons,¹ the Vermont Fuel Oil Dealers (“VFDA”), the Palmers and CLF.

Vermont Gas has demonstrated that the Addison Natural Gas Project (“Project”) is economically and environmentally beneficial to Vermont. The Memorandum of Understanding (“MOU”) with the Department of Public Service (“Department”) demonstrates VGS’s commitment to limit Project costs to customers to \$134 million, which is close to the amount last approved by the Public Service Board (“Board”). Vermont cannot afford to ignore this energy option that reduces costs and emissions while it works towards longer-term goals to further reduce emissions throughout the state.

I. THE MOU IS A BINDING COMMITMENT

CLF claims that the MOU is not binding because it “fails to create an obligation to contain costs,”² and instead only reflects the parties’ “intent.”³ This claim is contradicted by the

¹ The AARP and Lyons Briefs are identical and therefore only the AARP Brief is addressed.

² CLF Brief at 2.

³ CLF Brief at 3 (“[r]ather than present an actual commitment to cap costs ...the MOU states only that ‘[i]t is the Parties’ *intent* that recovery of any above-Rate Cap costs will be limited in scope” [emphasis in original]).

MOU language upon which CLF relies as well as the explicit and unequivocal testimony by VGS.

The MOU reference to intent relates only to the process of identifying and justifying exceptions to the Rate Cap, and not to the Rate Cap itself.⁴ Although CLF cites the fact that the MOU is not approved by the Board,⁵ the MOU specifically states that Board “approval shall not be necessary for the effectiveness of the MOU.”⁶ CLF cites the MOU provision reserving the right to advocate different positions in future proceedings,⁷ but this boilerplate provision is limited to (1) “future proceedings not referenced herein,”⁸ which excludes future rate cases,⁹ and (2) proceedings not necessary to enforce MOU rights and obligations.¹⁰ Finally, Vermont Gas repeatedly made clear that the MOU creates a binding commitment.¹¹

For these reasons, the MOU reflects a binding commitment and CLF’s contrary claim should be rejected.

II. CLAIMS RELATING TO FUEL PRICES, HEAT PUMPS AND CNG HAVE BEEN ADDRESSED PREVIOUSLY

AARP, CLF and VFDA claim that the impact of heat pumps, compressed natural gas (“CNG”) and updated fuel prices demonstrate that the record should be reopened.¹² Vermont Gas addressed these claims when raised earlier.¹³ As they pertain to the MOU, these claims should be rejected.

The Board limited the scope of the current proceeding to (1) the documents which AARP requested be incorporated into the record,¹⁴ and (2) the nature, relevance, and materiality of the MOU as it relates to the record of the First and Second Remand hearings (September 2014 and

⁴ Exh. 11-6-15 DJR-1 (“Exh. DJR-1”) at 2.

⁵ CLF Brief at 2.

⁶ Exh. DJR-1 at 3.

⁷ CLF Brief at 2.

⁸ Exh. DJR-1 at 3.

⁹ *Id.* at 2, 3.

¹⁰ *Id.* at 3.

¹¹ Tr. 12/1/15 at 37, 45, 61, 66-67 (Rendall); Tr. 12/1/15 at 102 (Simollardes); Tr. 12/9/15 at 88-89 (Rendall)

¹² AARP Brief at 3-5; CLF Brief at 2; VFDA Brief at 3-4.

¹³ Vermont Gas Proposal for Decision (July 8, 2015) at 24-26, 34-38.

¹⁴ They consist of complaints filed by VGS and Over & Under Piping Contractors, Inc. (“O&U”) in litigation between them and a VGS press release announcing Michels Corporation as the mainline contractor.

June 2015) and subsequent briefing.¹⁵ Updated fuel prices, heat pumps and CNG are unrelated to the O&U pleadings or the MOU and therefore are outside the scope of this proceeding.

In addition, the claims are largely a repetition of arguments raised during prior hearings¹⁶ that have already been fully reviewed in the post-hearing briefs.¹⁷ With respect to heat pumps, the Board previously found that they cannot meet the thermal needs of most commercial and industrial customers, and require a back-up heating system for residential customers.¹⁸

The Board should also reject AARP's claims relating to CNG for several reasons. First, CNG is practical only for large business customers.¹⁹ Second, the investments necessary to convert to CNG were pursued on the assumption that pipeline gas would be available in the future, and the necessary investments were in fact not made until after the Board approved the Project.²⁰ It would be unfair and illogical to reopen the Certificate of Public Good ("CPG") based on actions that were undertaken after issuance of the CPG, and in reliance on the availability of pipeline gas.²¹ Third, in approving the Project, the Board found, based on record evidence, that CNG might be deployed before the Project is completed.²² That this potential deployment in fact occurred does not constitute newly-discovered evidence within the scope of Rule 60(b).²³ Because the Board recognized the potential for CNG prior to Project completion, AARP is also incorrect in claiming that installation of CNG is incompatible with use of ratepayer funds to construct the Project.²⁴

¹⁵ November 2 Order at 4.

¹⁶ AARP Brief at 4-5 cites Dr. Dismukes Prefiled MOU Testimony ("Pf.") at 13-17, which refers to Dismukes testimony and press releases at least six months old. Similarly CLF Brief at 3-4 cites the June hearing testimony and exhibits.

¹⁷ Vermont Gas Proposal for Decision (July 8, 2015) at 24-26, 34-38.

¹⁸ *Petition of Vermont Gas Systems, Inc.*, Docket No. 7970 (Vt. Pub. Serv. Bd. Oct. 10, 2014) ("First Remand Order") at 12.

¹⁹ Hopkins 5/6/15 Pf. at 3; Tr. 6/22/15 at 57 (Rendall).

²⁰ VGS 7/8/15 Response to Board Information Request (Agri-Mark Corresp. dated July 6, 2015).

²¹ Dr. Hopkins agreed with this conclusion. Tr. 12/9/15 at 118-19 (Hopkins). Notwithstanding Dr. Hopkins' testimony, AARP claims that Dr. Hopkins concluded that the impact of CNG eliminates any Project economic benefit. AARP Brief at 4-5. The sole basis for this conclusion is Dr. Dismukes' interpretation of Dr. Hopkins' "attachments" that were not offered or admitted into evidence. Dismukes MOU Pf. at 15, nn. 56-57. This claim is not entitled to any credence in light of the facts that Dr. Dismukes chose not to undertake a similar analysis in his MOU testimony and that AARP chose not to substantiate this claim in its cross-examination of Dr. Hopkins.

²² Final Order at 71 (Cabot would choose CNG if project delayed, but prefer pipeline gas).

²³ Moore's Federal Practice, 3rd Ed. (2015), ¶ 60.42[2] (newly discovered evidence must, among other things, have been discovered after trial, must not be merely cumulative and must be so significant as to change the outcome of the case).

²⁴ AARP Brief at 3.

VFDA claims that “drastic” changes in the energy markets have “erased” the Project’s benefits.²⁵ Other than testimony filed before the June hearings,²⁶ the sole basis for its assertion is a December 2015 fuel forecast that is not in evidence.²⁷ VFDA does not identify the impact of the update on the Project’s economic benefit. The Board should reject VFDA’s claim that its update erased all Project benefits, in light of the fact that it merely adds another month to Dr. Dismukes’ update, which itself had minimal impact.

III. THE PROJECT WILL BE CONSTRUCTED AND OPERATED IN COMPLIANCE WITH APPLICABLE SAFETY REQUIREMENTS

AARP quotes various snippets of Department staff inspection reports.²⁸ Although AARP does not indicate what the Board is supposed to conclude from its recitation,²⁹ the only credible evidence makes clear that it should have no impact on the Board’s decision. Commissioner Recchia testified that Department inspectors are insuring that work is and will be conducted in accordance with applicable safety standards.³⁰ Mr. Rendall testified that Vermont Gas has worked through with the Department the issues identified by AARP.³¹

The Palmers claim that there is no assurance that the MOU Rate Cap will not diminish safety.³² Mr. Recchia, however, made clear that it will continue to monitor pipeline construction to ensure that the pipeline complies with applicable safety standards.³³

²⁵ VFDA Brief at 4.

The only other claim relating to updated fuel prices was addressed in VGS’ Initial Brief at 5-6 (responding to Dismukes’ fuel price update, cited in CLF’s Brief at 2).

²⁶ VFDA Brief at 3-4 (citing Cota Pf. at 5-9).

²⁷ Vermont Gas objects to VFDA’s request of the Board to take administrative notice of the report. VFDA Brief at 4, n. 1. The report addresses matters outside the scope of this proceeding and, absent an incorporation of the update into an economic benefit analysis, there has not been an adequate demonstration of relevance.

²⁸ AARP Brief at 5, n. 2.

²⁹ AARP’s counsel claimed during the hearings that he “will show ... that the [information identified in the inspection reports] became cost problems, and ... delay problems.” Tr. 12/9/15 at 23 (Dumont). No such claims appear in AARP’s brief.

³⁰ Recchia MOU Pf. at 2; tr. 12/9/15 at 122-23 (Recchia).

³¹ Tr. 12/9/15 at 32, 35, 39 (Rendall).

³² Palmer Brief at 7.

³³ Recchia MOU Pf. at 2; tr. 12/9/15 at 121-22 (Recchia).

IV. THE PARTIES' OTHER CLAIMS PROVIDE NO BASIS FOR REOPENING THE RECORD

Although AARP devotes a large portion of its brief to the O&U dispute and O&U's performance during construction,³⁴ almost all of its analysis consists of a repetition of the previous record.³⁵ In particular, it claims that the Board mistakenly assumed in its First Remand Order that new management (rather than the previous consultant) produced the \$121.6 million estimate.³⁶ In fact the Board acknowledged that that the estimate was produced by CHA rather than the new project manager.³⁷

AARP also claims that the MOU has limited relevance because it does not address various motions filed by AARP and others.³⁸ AARP is incorrect. The MOU clearly affects the economic benefit and general good standards.³⁹

AARP claims that in September, 2014 Mr. Roam "'realized' that the project cost was going to cost 'quite a bit more' than \$121.6 million," and that Ms. Simollardes agreed with Mr. Roam's testimony.⁴⁰ In fact, Ms. Simollardes testified that "in September [Mr. Roam] observed actual construction costs being higher than what he had planned for construction costs, not the budget, not the overall project, but the construction costs."⁴¹

AARP claims, based on Rule 5.408 and unidentified Board precedent, that VGS is precluded from proceeding with the Project without an amended permit.⁴² This claim is the subject of a separate proceeding⁴³ and is therefore outside the scope of this docket. More

³⁴ AARP Brief at 10-14.

³⁵ The only exception relates to the VGS Complaint against O&U. AARP Brief at 11 (citing Exh. AARP Cross V, ¶ 19, alleging that O&U failed to act in good faith in finalizing and executing a written contract).

³⁶ AARP Brief at 13 (Board conclusion that "new management ... is capable and is producing reasonable cost projections" was mistaken because "old management had been responsible for the \$121.6 million estimate").

³⁷ First Remand Order at 20-21 ("VGS has indicated that the updated cost projections in July were prepared by the previous firm, CHA ...").

³⁸ AARP Brief at 6-10.

³⁹ Simollardes MOU Pf. at 1-2 (economic benefit), 2-4 (general good standard). In fact, many of the motions cited by AARP also relate to those standards. AARP Brief at 7 (Lyons, Palmers 7/21/14 motion re cost increase), 7 (DPS 12/22/14 motion to reopen in response to cost increase), 8 (AARP, Lyons 1/12/15 motion to reopen in response to cost increase).

⁴⁰ AARP Brief at 12 (emphasis added), citing tr. 6/22/15 at 110-112 (Roam); tr. 6/23/15 at 16 (Simollardes).

⁴¹ Tr. 6/23/15 at 16 (Simollardes) (emphasis added).

⁴² AARP Brief at 15, citing AARP's July 8, 2015 brief in which it claimed that the cost update represents a substantial change under Rule 5.408, thereby requiring a CPG amendment.

⁴³ *Petition of Conservation Law Foundation, etc.*, Docket No. 8330 (Vt. Pub. Serv. Bd. Sept. 10, 2014).

importantly, the Board rejected an identical argument in the Northwest Reliability Project,⁴⁴ and AARP has not identified any basis for requiring a different result in this case.

AARP further implies that Vermont Gas has failed to comply with its obligation to assess whether the Project continues to promote the public good, citing the Board's decision in Docket No. 5983.⁴⁵ AARP is incorrect. Vermont Gas has continually demonstrated that the Project provides an economic benefit and promotes the general good.


AARP claims that a system expansion should be rejected if it requires any support from existing customers.⁴⁶ It cites a Federal Energy Regulatory Commission decision in support of its claim.⁴⁷ The Board, in this case, has decided otherwise, in approving the Project notwithstanding the need for support from existing customers early in the life of the Project.⁴⁸ The Board stated that early years of project revenues will not cover incremental costs but that, over time, "the newly served customers will provide contributions to fixed costs of the overall system and thereby benefit all customers."⁴⁹

For all of the above reasons, the opponents' claims should be rejected and the record should not be reopened.

Dated at Burlington, Vermont this 23rd day of December 2015.

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⁴⁴ *In re Vermont Electric Power Co., Inc.* Docket No. 6860 (Vt. Pub. Serv. Bd. Sept. 23, 2005) at 19.

⁴⁵ AARP Brief at 15, citing *Re Green Mountain Power Corp.*, Docket No. 5983 (Vt. Pub. Serv. Bd. (Feb. 27, 1998)).

⁴⁶ AARP Brief at 16.

⁴⁷ *Certification of New Interstate Natural Gas Pipeline Facilities*, Order Clarifying Statement of Policy, 90 FERC ¶61,128 (2000).

⁴⁸ Final Order at 143; First Remand Order at 26.

⁴⁹ Final Order at 143.